[illegible]

October Term, 1969

No. 649

[illegible] O. Fielding, Sales Manager, on Behalf of the Estate of Albert G. Hamamoto, Deceased, Alfons L[illegible]nda, Clifford A. Jones, et al.,

Petitioners,

v.

Federal Savings and Loan Insurance Corporation, a corporation, Simon D. [illegible], [illegible] Bertuna, and Honorable [illegible] T. Thompson, United States District Judge,

Respondents.

BRIEF OF RESPONDENT FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Charles E. Richenbaugh
Peter R. Taft
Mullen, Tolles, Hills & Richenbaugh
606 South Hill Street
Suite 1100
Los Angeles, California 90014
Attorneys for Federal Savings and Loan Insurance Corporation

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 849

ROBERT C. FIELDING, SALLY NEUMEYER, as Executrix of the Estate of ALBERT G. NEUMEYER, Deceased, ALFONS LANDA, CLIFFORD A. JONES, ET AL.,
Petitioners,

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a corporation, GEORGE D. WEBSTER, JOHN HENRY BREBBIA, and HONORABLE BRUCE R. THOMPSON, United States District Judge, *Respondents.*

BRIEF OF RESPONDENT CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Whether this Court should review the sufficiency of the evidence supporting the trial court's finding of fact that counsel for respondent Federal Savings and Loan Insurance Corporation never represented peti-

tioner Albert G. Neumeyer, deceased, and is therefore not subject to disqualification as counsel herein.

2. Whether the trial court was acting within its inherent power to control the disposition of the causes on its docket by ordering that a suppression of evidence issue be explored by pre-trial discovery procedures rather than by evidentiary hearing.

STATEMENT OF THE CASE

Procedural Background

Petitioners misstate the rulings of the District Court giving rise to the mandamus proceeding in the Ninth Circuit Court of Appeals and subsequent Petition for Writ of Certiorari. On April 1, 1970, petitioners filed an eleven part motion for restraining orders and injunctive relief. The first five requests dealt with the alleged conflict of interest of respondent Federal Savings and Loan Insurance Corporation's ("FSLIC") counsel, Munger, Tolles, Hills & Rickershauser ("MTH&R") and the second six requests dealt with alleged breaches of privileged communications between certain petitioners and their alleged one-time lawyers, George D. Webster and John Henry Brebbia.

The first five requests, dealing with the alleged conflict of interest of MTH&R, were denied on the merits. Petitioners imply that the hearing was improperly limited by the trial court to affidavits. See Petition, p. 6. Quite the contrary, the trial court offered to hear whatever evidence the parties wished to introduce and petitioners chose to submit on affidavits alone. See Appendix E to Petition for Writ of Certiorari. Petitioners' deliberate choice of affidavits on the MTH&R conflict of interest is emphasized by the fact that on

the remaining requests for injunctive relief relating to the Webster-Brebbia matter, they sought an evidentiary hearing with oral testimony. See Appendix D to Petition.

With respect to the six part motion for injunctive relief on the Webster-Brebbia matter, petitioners claim that their motion was denied on the merits. See Petition, p. 6. This is not true. As the order of May 28, 1970, makes perfectly clear, the court ruled that claims of privilege "cannot providently be determined in advance and must await the assertion of the privilege in response to a specific interrogatory in the normal and orderly course of pre-trial and trial proceedings . . . ." Appendix D to Petition. With respect to the possible suppression of evidence, the court noted that the issue is sufficiently complicated that "the fullest development of the facts [on discovery] is needed for a determination of such an issue." *Ibid.* Both parties have been proceeding with discovery on the Webster-Brebbia matter by deposition prior to renewal of petitioners' motion. Petitioners are therefore fully aware that the Webster-Brebbia matter has not been determined on the merits.

Finally, neither Webster nor Brebbia are properly before the Court. Although named in the motion for preliminary injunctions and restraining orders, neither one is party to the action in the trial court and petitioners have made no attempts to join them. Nor are they counsel, either of record or otherwise, to any of the parties in the action. As a consequence neither the trial court, nor the Court of Appeals nor this Court have jurisdiction over them. See Appendix 1 attached hereto (affidavit filed in Court of Appeals).

Statement of Facts Re: MTH&R Conflict of Interest

Petitioners' statement of facts relevant to the alleged conflict of interest of MTH&R is sufficiently misleading as to require a full restatement. As noted in the Petition, on or about May 23, 1967, First Western Savings and Loan Association ("FWS&LA") filed suit against six of the petitioners alleging waste and mismanagement and breach of their fiduciary duties as former officers and directors of FWS&LA. Two weeks later on June 6, 1967, several of the defendants in the state case met at the residence of Albert Neumeyer, deceased. There is no evidence of any agreement for a common or joint defense prior to that meeting. Norbert A. Schlei, then Of Counsel to MTH&R, attended that meeting at the request of Albert Neumeyer.

Neumeyer's first affidavit states the legal conclusion that Schlei was invited to attend the meeting "as counsel to affiant." Appendix K, ¶5 to Petition. However, without the details of who invited Schlei, what statements were made or agreements entered into, the necessary evidentiary support for Neumeyer's legal conclusion is missing.

Schlei states that he received a telephone call from Neumeyer on June 5, 1967, inviting Schlei to his apartment the following day. Neumeyer told Schlei that he had been sued in Nevada and that he wanted to discuss with Schlei whether he should be separately represented and, if he should, whether Schlei would take the assignment. Appendix J, ¶2 to Petition. Neumeyer did not deny these statements in his reply affidavit. Appendix 2, attached hereto.

There is no evidence of any further private discussion or meeting between Neumeyer and Schlei prior

to or during the June 6th meeting. The next private conversation is described by Schlei as follows:

> "5. After the meeting Mrs. Neumeyer joined the group and cocktails were served. Mr. Neumeyer and I had an opportunity to discuss briefly the questions he had raised before the meeting, and he said he had decided that no separate representation would be necessary at that time, although as the matter progressed he might wish to reconsider the question." Appendix J, ¶ 5 to Petition.

Since Schlei was not retained, he did not send a bill. *Id.* at ¶ 7. The above conversation and the fact that Schlei did not bill are not denied by Neumeyer. Appendix 2, attached hereto.

The foregoing undisputed evidence is an adequate basis for the trial court's finding that no attorney-client relationship was ever established between Schlei and Neumeyer.

The evidence also substantiates the trial court's finding that the June 6, 1967, meeting itself was not privileged. The affidavit of attorney David Brady states that those present at the meeting were defendants Neumeyer, Fielding, Hellmer and Moss (all petitioners herein), Judge Taylor H. Wines of the law firm of Galane & Wines of Las Vegas, Nevada, representing the defendants in the state case, and attorneys Stanley Leland, Norbert A. Schlei and Clifford A. Jones. Appendix 3, ¶ 5, attached hereto. According to Brady, Schlei and Leland appeared to be "personal counsel or advisers" for Neumeyer. *Ibid.* Brady himself represented Fielding and Neumeyer and told those assembled that he had already advised his clients that they should cooperate only "to the extent that was consistent with their own interests and problems."

Id. at ¶ 7. Neumeyer apparently did not even trust Fielding (jointly represented by Brady) since he invited both Schlei and a third attorney Stanley Leland to observe.

Finally there is the unexplained presence of a third party, Clifford Jones, a petitioner herein who chose not to file an affidavit in the court below. He was not a party in the state case; he is not identified as being an attorney for any defendant at the meeting or as being present for the benefit of any other defendant.

As a precaution against any alleged conflict of interest, prior to filing suit on November 12, 1968 in the case at bar, Norbert Schlei called Albert Neumeyer and obtained his consent to represent respondent FSLIC. Claiming Neumeyer was misled, petitioners quote a portion of Schlei's affidavit to the effect MTH&R was only to consult FSLIC and not file suit against Neumeyer. Petition, p. 14. Petitioners omit the remainder of the paragraph in the affidavit which states Schlei informed Neumeyer, as follows:

> "If the firm's recommendation should be that pending litigation ought to be continued or other litigation instituted, the firm would undoubtedly be asked to handle such litigation and, of course, would want to be free to do so if it took the engagement at all . . . . He [Neumeyer] agreed, saying that I could tell the firm that it should feel free to go ahead and would encounter no objections from him based on my prior involvement." See Appendix J, ¶ 11, to Petition.

Based on the foregoing, the trial court found that Neumeyer was fully informed and freely consented to MTH&R representing respondent FSLIC.

Facts Re: Webster-Brebbia Matter

Respondent FSLIC does not agree with the statement of facts in the Petition regarding the Webster-Brebbia matter. Many of the statements found in the Petition, pp. 9-11, are conclusions made without record citation. However, in view of the fact that the issue is still before the trial court on the merits, a restatement is not required here.

ARGUMENT

The Petition for Writ of Certiorari should be denied. On the alleged conflict of interest of MTH&R, petitioners seek review of the sufficiency of the evidence supporting the trial court's findings of fact as adopted by the Court of Appeals. On the Webster-Brebbia matter, petitioners seek review on a matter which is currently being developed through the discovery process and has yet to be presented to the trial court. Neither of these matters present an issue worthy of this Court's attention.

No Legal Issue Is Presented on the Alleged Conflict of MTH&R

Although petitioners chose to submit the conflict of interest issue on affidavits, they now seek to have the appellate courts make *de novo* findings of fact. Although respondent has found no federal case on the standard of review for disqualification of counsel issues, California also reviews by mandamus. In *Big Bear Municipal Water District* v. *Superior Court*, 269 Cal. App. 2d 919, 927, —— P.2d —— (1969), the court said:

> "Such a motion may be heard on affidavits (*Grove* v. *Grove Valve & Regulator Co.*, *supra*, p. 654 [213 Cal. App.2d 646]) and if the trial court resolves

> the issue on conflicting evidence, its determination is conclusive on appeal. (*Jacuzzi* v. *Jacuzzi Brothers, Inc.*, *supra*, 218 Cal. App. 2d 24, 27-28.)"

Having chosen to proceed on affidavits, petitioners cannot be heard to complain.

In the courts below all parties agreed the conflict of interest issue should be resolved in accord with the law of California, the situs of the June 6, 1957, meeting, the residence of Norbert Schlei and Albert Neumeyer, and the state in which Schlei practiced.

It is well settled California law, based on the early case of *Hicks* v. *Drew*, 117 Cal. 305, 49 Pac. 189 (1897), that:

> "Preliminary conversations between an attorney and a prospective client, wherein the latter states the facts of the case, and the attorney states the fee he would require, whereupon no agreement is reached and another attorney is employed to try the case, do not create the relation of attorney-client so as to disqualify the attorney from appearing in the same case on behalf of the adverse party." 6 *Cal. Jur.* 2d, Attorneys at Law, § 42.

See also *Knight* v. *Ross*, 77 Cal. 410, 412, 19 Pac. 698 (1888); *Meehan* v. *Hopps*, 144 Cal. App. 2d 284, 301 P.2d 10 (1956); *Keenan* v. *Scott*, 64 W.Va. 137, 61 S.E. 806 (1908); *Delong* v. *Miller*, 133 Cal. App. 2d 175, 283 P.2d 762 (1955). This rule applies in spite of the fact that such preliminary conversations are included within the evidentiary privilege of confidential communications between attorney and client. See *Estate of DuPont*, 60 Cal. App. 2d 276, 140 P.2d 866 (1943); *People* v. *Abair*, 102 Cal. App.2d 765, 771-72, 228 P.2d 336 (1951). As stated in *Estate of DuPont*,

the privilege applies to these preliminary conversations

> "notwithstanding the attorney may be afterward employed by the adversary of the person who made such communication." 60 Cal. App. 2d at 288.

This accommodation between the law of evidence and the law of conflict of interest prevents the prospective client's words from being used against him, but preserves the lawyer's right to practice. Thus a reasonable balance between the competing interests has been achieved. If the rule were otherwise, the California Supreme Court noted in *Hicks* v. *Drew*,

> "it would be an easy matter to disqualify all those attorneys whom a party neither decided to retain, nor to allow the opposing party to retain." 117 Cal. at 307.

In the court below petitioners argue that the new California Evidence Code passed in 1965, Section 951, changed this rule. However, this section merely codified the rule of *Estate of DuPont*. In accord with the California Constitution, Article 4, Section 9, the new Evidence Code is intended to establish only the law of the evidence. See California Evidence Code, § 900; *Id.* at Division 2, Official Comment of the Law Revision Commission. Since Section 951 merely codified existing law, there is no implied amendment of the rule of *Hicks* v. *Drew*, for implied amendment of related rules of law only takes place where they cannot be construed in *pari materia* with the new statute. See *County of Los Angeles* v. *Frisbie*, 19 Cal. 2d 634, 644, 122 P.2d 526 (1942).

Finally, it is the express provision of Rule 5 of the California State Bar Rules of Professional Conduct

that consent of a former client will permit an attorney to represent a conflicting interest. See Appendix C to the Petition. The trial court found consent in this case as an alternative holding to its finding of no attorney-client relationship.

None of petitioners' cases deal with the facts as found by the trial court and adopted by the Court of Appeals.

Petitioners also claim a conflict of interest on the ground that Alan Moscov, General Counsel of the Federal Home Loan Bank Board (the parent body of FSLIC) at the time the case at bar was filed, is now a partner in MTH&R. As noted by the trial court, there can be no conflict of interest since Mr. Moscov is representing the same client as a member of MTH&R as he was when General Counsel to the Bank Board. By its express terms, 18 U.S.C. § 207(a) does not apply to a former employee who is retained to represent the United States. Section 207(a) has been incorporated in Section 510.2 of the General Regulations of the Federal Home Loan Bank Board. This specifically allows continued representation of FSLIC after termination of employment with the Bank Board. It states in relevant part:

> "No former employee of the Board, the Corporation [FSLIC] or a Bank shall appear in any proceeding or other matter before the Board as attorney or other representative of any party (*other than the Board, the Corporation, or a Bank*) . . . ." (Emphasis added.)

Because it is possible under the assignment of claims that part of the recovery herein might be paid over to FWS&LA, petitioners claim Moscov is representing an

interest other than the United States. This conclusion is totally without factual or legal authority and is contrary to the trial court's finding that the assignment is authorized by federal statute and governed by federal law as part of the regulatory scheme under the National Housing Act. *FSLIC* v. *Fielding*, 309 F.Supp. 1146, 1151 (D. Nev. 1969). *Cf. United States* v. *Summerlin*, 310 U.S. 414 (1940) (private claim assigned to FHA constitutes a suit by the United States). Even where a federal agency seeks a monetary recovery for private parties only, attorneys for the agency represent only the governmental interest in the litigation. See *SEC* v. *Texas Gulf Sulfur Co.*, 312 F.Supp. 77, 90-94 (S.D. N.Y. 1970).

The Webster-Brebbia Matter Is Not Ripe for Appellate Review

The only issue presented at this time is whether the trial court could properly defer decision on the matters raised by the second six requests for injunctive relief until full discovery of the matters has been completed. Although petitioners' requested relief is styled as an injunction, it actually deals only with the procedures to be followed for raising and determining pre-trial legal issues and is not appealable within the meaning of 28 U.S.C. § 1292(a)(1). In *American Airlines* v. *Forman*, 204 F.2d 230 (3d Cir. 1953), the trial court had denied a motion for stay pending the primary jurisdiction of the CAB "without prejudice to its renewal after answer and the more precise framing of the actual contested issues through appropriate pre-trial procedure." The Third Circuit held the order was not appealable on the ground that it involved only proper judicial control over pre-trial procedures. This is in line with this Court's holding in *Landis* v. *North American Co.*, 299

U.S. 248, 254 (1936) to the effect that judicial regulation of the pre-trial progress in the case

> "is incidential to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."

See also *United Gas Pipeline Co.* v. *Tyler Gas Service Co.*, 247 F.2d 681 (5th Cir. 1957); *Republic of China* v. *National City Bank of New York*, 194 F.2d 170 (2d. Cir. 1952); *Glen Oaks Utilities, Inc.* v. *City of Houston*, 280 F.2d 330 (5th Cir. 1960). By deferring its ruling until the completion of discovery, the trial court has acted properly within its inherent discretionary power as set forth in *Landis*.

In addition to the above, petitioners have a difficult legal burden to meet even if the facts they allege are admitted. Petitioners contend that Webster and Brebbia were counsel for certain of the petitioners both in their individual and corporate capacities as officers and directors in matters relating to FWS&LA and its holding company, First Western Financial Corporation. Petitioners also concede that Webster and Brebbia represented both of the above corporations and that Webster was an officer of First Western Financial. It is hornbook law that where several parties use a common counsel, there is no attorney-client privilege as between the parties in a lawsuit concerning the subject matter of the joint representation. 8 *Wigmore on Evidence* § 2312 (McNaughton rev. 1961); *Baldwin* v. *IRS*, 125 F.2d 812 (9th Cir. 1942). As assignee of First Western Savings and Loan Association in a suit on claims involving said joint representation, respondent FSLIC assumes the position of its assignor. Con-

sequently, there is no privilege to claim. In fact, as assignee, FSLIC obtains all the necessary incidents necessary to prosecute the litigation including the right to hold or waive any attorney-client privilege that may exist in favor of its assignor. See Cal. Civil Code, § 1084; Cal. Evidence Code, § 962; 8 *Wigmore on Evidence*, § 2328 (McNaughton rev. 1961); *Burick* v. *Kruckeberg*, 95 N.E. 2d 304, 308 (Ind. 1950). Consequently it has equal rights of access to the information petitioners claim is privileged. Petitioners' own case, *E. F. Hutton & Co.* v. *Brown*, 305 F. Supp. 371 (S.D. Tex. 1969) goes even further. It holds that the knowledge of the corporate officer is the knowledge of the corporation. Thus the corporation has full rights to use all records and information supplied by its officers to corporate counsel even where the officers believed that corporate counsel was also representing them individually. Finally, it is equally well settled that the files of an attorney are the property of his client. See *Morse* v. *Eighth Judicial District Court of the State of Nevada*, 195 P.2d [illegible] 3 ALR 2d 136 (Nev. Sup. Ct. 1948); *Annotation*, 3 ALR 148 (1948). Consequently, even with respect to the files allegedly stolen from the Landa law firm, First Western Financial Corporation was entitled to possession of the legal files its officers allegedly stole.

In light of the above, petitioners have yet to establish a *prima facie* case, even assuming the truth of their allegations. The trial court's decision to defer ruling until the completion of discovery is therefore not only fair, but generous.

CONCLUSION

For the foregoing reasons, respondent FSLIC respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CHARLES E. RICKERSHAUSER
PETER R. TAFT
MUNGER, TOLLES, HILLS &
RICKERSHAUSER
606 South Hill Street
Suite 1100
Los Angeles, California 90014
Attorneys for Federal
Savings and Loan
Insurance Corporation